BOARD OF APPEALS CASE NO. 073	*	BEFORE THE
APPLICANT: 1022 S. Fountain Green Road LLC and MD Country Club	*	ZONING HEARING EXAMINER
REQUEST: Rezone 167.2 acres from AG to R1; 1022 S. Fountain Green Road, Bel Air	*	OF HARFORD COUNTY
	*	Hearing Advertised
	*	Aegis: 12/24/97 & 12/31/97
HEARING DATE: February 2, 1998		Record: 12/26/97 & ½/98
	*	

* * * * * * * * *

ZONING HEARING EXAMINER'S DECISION

The Applicant, South Fountain Green Road L.L.C. (hereinafter LLC) seeks a zoning reclassification of approximately 167.2 acres from its present AG zoning to R1.

The subject parcels are located at 1022 South Fountain Green Road, Bel Air, Maryland 21015 and are more particularly identified on Tax Maps 49, 50, Grid 2A, Parcels 57, 329 and 715. The parcels consist of 162.6 acres on Parcel 57, 169.7 acres on Parcel 329 and 1.92 acres on Parcel 715. Of the total acreage all of Parcel 57 is subject to this request for zoning reclassification while only 4.36 acres of Parcel 329 and 0,24 acres of Parcel 715 are subject to review. The property is presently zoned AG and is located within the Third Election District.

Mr. William P. Maloney appeared and testified on behalf of LLC. The witness indicated that he is a member of the LLC and is a builder and developer. LLC is the contract purchaser of the property and plans to develop the property by constructing large homes on large lots. Water and sewer will be provided to the property via easements across the Maryland Country Club property which were obtained by agreement in April, 1997. Mr. Maloney testified that there is a market demand for the type of homes and lots he intends to develop on the property. The development will take nearly 14 years to complete with an average of 25 homes per year built and sold.

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

Mr. Chuck Boyle, President of Maryland Country Club appeared next. The witness testified that the club has agreed to allow water and sewer easements across its property to serve the subject development. LLC will purchase a portion of the Club land in return for the Club receiving use of a portion of LLC land for a practice facility. Mr. Boyle commented that he was in favor of the development as proposed by Mr. Maloney and that the rezoning was, in his opinion, appropriate.

Next to testify was Paul Muddiman, who was accepted as an expert in site plan design. Mr. Muddiman explained that there have been significant changes in water/sewer service to the subject property since the 1989 comprehensive rezoning. In 1989, there was no water or sewer service to this property, nor was there service planned for this property during that time period. Two elevated water tanks have been erected in the vicinity of the subject parcel in 1991 and that new water feeder lines have been installed in the area between 1991 and 1995. Additionally both water and sewer lines have been expanded since 1989. Mr. Muddiman indicated that, without the easements granted by the Country Club to LLC, water and sewer service would not be feasible for the subject property. Further, Mr. Muddiman indicated that in 1989, the County Council could not have known that such easements would be granted in 1997.

Mr. Muddiman reviewed in detail the various Council Bills that impacted the development of the water and sewer system in the vicinity of the subject parcel since 1989. On December 1, 1989, Harford County hired Rommel, Klepper and Kahl (RKK) to study the needed improvements to the Harford County Water and Sewer Plan. On April 20, 1990, the two tanks discussed above were added to the Master Water and Sewer Plan. The RKK report was finalized on June 15, 1990 which recommended detailed improvements to the water and sewer system. Mr. Muddiman then discussed each appropriation bill made by the Council since 1989 which appropriated the necessary funds for construction of the RKK improvements. Based on his research, Mr. Muddiman indicated that the County Council could not have been aware in 1989 of any of these improvement when it considered comprehensive rezoning. Additionally, the witness testified that the present improvements were specifically designed to serve residential development on the subject site.

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

Mr. Wes Guckert appeared next and was admitted as an expert traffic consultant. Mr. Guckert described his traffic study of the proposed development and concluded, based on his study, that all intersections will continue to operate at acceptable levels after development is completed. In the opinion of the witness there would be no adverse traffic impacts associated with the proposed development.

Mr. Roger Mainster appeared next and was admitted as an expert real estate appraiser The witness stated that he had conducted a study of property values in the adjoining subdivisions and found that property values have continued to rise over the years in both Foxborough Farms and Greenridge II. Mr. Mainster concluded that development of the subject property as single family homes as proposed by the developer would not adversely impact existing home prices and would, in his opinion, contribute to an increase in market value of those homes.

Mr. DeWitt Tharpe appeared next and testified that he had farmed the LLC property for the past four years, raising corn, soybeans and hay. The witness stated that he encountered problems farming the subject property resulting from its proximity to residential developments. For example, he had to stop raising livestock on the parcel because cattle would often escape and create problems in the adjoining community. Some areas of the property have been cleared and used for parties, damaging the crops and land. He has found trash, bicycles, tires and yard debris dumped on the property. He also stated that neighbors use the property for walks, ride bicycles, walk their dogs and otherwise use the property as a park despite the fact that the property is posted against trespassing.

Ms. Donna McConaghy, Mr. Bernie Muth and Mrs. Dawn Reinecke, residents in adjoining developments appeared and testified in support of the rezoning and the proposed development.

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

Mr. Denis Canavan appeared next and was admitted as an expert in land use and planning. Mr. Canavan stated that during the 1989 Comprehensive Rezoning process the County Council had a policy of following the Land Use Plan and zoning properties consistent with that plan. He indicated that zoning the property AG was consistent with the 1989 Land Use Plan but was inconsistent with the 1996 Land Use Plan. Mr. Canavan outlined the reasons for his opinion that the Council made a legal mistake in 1989 when it zoned the subject parcel AG.

First, the Master Water and Sewer Plan was extended to include the subject property after the 1989 Comprehensive Rezoning process was completed. Secondly, water and sewer service is now available to the subject property. Based on the research conducted and described by an earlier witness, Paul Muddiman, it was clear to Mr. Canavan that all of the necessary improvements which allow water and sewer service to this property occurred after the 1989 Comprehensive Rezoning process and could not have been known by the Council at that time. In Mr. Canavan's opinion, had the Council known that these improvements would be constructed in the next several years after comprehensive rezoning, the Council would have considered these factors in its decision. It is clear to Mr. Canavan that it is inappropriate for a property served by municipal water and sewer to be zoned AG. Third, the County Master Land Use Plan has changed and now classifies the property as low intensity and locates the property within the development envelope. In 1989 the property was classified as agricultural/rural and was located outside of the development envelope. Fourth, traffic improvements are planned for the intersection of MD Route 543 and Wheel Road which he believes will improve traffic flow in the vicinity of the property. The Department of Planning and Zoning now indicates a need in the vicinity of the subject parcel for additional single family detached homes which would serve as a transition buffer between the residential development envelope and rural area.

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

Mr. Canavan reiterated his position that a mistake was made by the 1989 Council in that future facts were not taken into account in the 1989 decision which, had they been known, would have been considered and would have impacted the Council's decision. He stated that it is now appropriate to rezone this parcel R1. While it is possible to farm the property, in the opinion of Mr. Canavan it is inappropriate to have a large parcel of AG land located within the development envelope. Additionally, Mr. Canavan pointed out that many uses permitted in the AG District could potentially have significantly more impact to adjoining residential properties than the proposed residential development. As a closing remark the witness stated that it is presently the policy of the Department of Planning and Zoning and the Council to rezone properties consistent with the Master Land Use Plan and that the Council proposed to do just that in regard to this property as a result of the 1997 Comprehensive Rezoning which is complete but subject to referendum vote.

Mr. Anthony McClune, Chief of Current Planning of the Harford County Department of Planning and Zoning appeared next. Mr. McClune stated that the Department supported the rezoning of this parcel to R1 both during the 1997 Comprehensive Rezoning and through the present petition. He opined that a mistake in the legal sense had been made by the 1989 Council because that Council did know the facts surrounding expansion of the water and sewer system which occurred in the early 1990's. He also indicated that the property is presently located within the development envelope where the County plans and expects development growth.

Several persons appeared in opposition to the present Application. Theresa Garland opposed the Application because she felt it was inappropriate to consider rezoning this parcel pending the referendum vote, was concerned about wildlife displacement, wetlands disturbance, traffic volume increase and decreased air quality. The witness was also concerned that townhomes would be built on the subject property.

Mr. Jewel Wiley testified to similar concerns as Ms. Garland and added that further development would lead to overcrowding of schools and that Harford County did not need anymore new homes. Bill Schmidt appeared and opined that it was not fair prove a mistake because of facts not known to the Council in 1989. Birgette Grubb and Chris Anden both expressed similar concerns as earlier witnesses. Ellis Hersch appeared and expressed concerns regarding construction of townhomes on the parcel.

Mr. Paul Muddiman was recalled on rebuttal. The witness testified that in the R1 district, townhomes may be built if at least 30% of the site is comprised of wetlands. In regard to this property, 56 acres of NRD would need to exist to meet the requirement for townhomes but there are only 35 acres of NRD present. In the opinion of the witness, townhouses would not be allowed on the subject property.

CONCLUSION:

Preliminary to the Hearing, certain opponents filed a Motion to Dismiss which was joined by People's Counsel. Some history is in order.

In January, 1996, the Harford County Council voted to commence Comprehensive Rezoning Review pursuant to Code Section 267-13 et seq. And Article VII, section 701 of the Harford County Charter. Thereafter, the Department of Planning and Zoning accepted applications for comprehensive rezoning from July, 1996 through October 15, 1996. During November and December, 1996 the Department. As required by Code Sec. 267-13(B)(1), reviewed each application and solicited comments upon each application from other county departments and planning councils. In February, 1997, the Department of Planning and Zoning prepared its proposed revisions and recommendations to the Council. These recommendations were the subject of public meetings and further review during the Spring of 1997. In May, 1997, the Department submitted its final recommendations to the Planning Advisory Board (PAB).

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

After review by PAB, the County Executive submitted the proposed revisions and amendments to the Zoning Maps to the County Council who then entered into "the period of Council Review" as required by Code Sec. 267-13(D).

In August, 1997 Council Bill 97-55 was introduced which proposed changes to the County Zoning Maps. On October 1, 1997 the Council passed Bill 97-55 thereby adopting the recommended changes and amendments to the zoning maps.

In November, 1997, 5,400 Harford County citizens took legislative action to Petition Bill 97-55 to referendum, thereby delaying adoption (or defeat) of the Bill and the changes to the zoning maps that it contemplates until November, 1998.

The gist of the opponent's argument is twofold. First, the opponents argue that the present Petition is barred by Section 267-13 (E)(1) of the Harford County Code which states:

> "Suspension of zoning reclassification.
>
> (1) Notwithstanding any provisions of this Code, during the period of preparation and review of proposed comprehensive revisions or amendments to the Zoning Maps, no applications for zoning reclassification shall be accepted by the county, except as provided in Subsection C of this section, and such a request shall be considered in the preparation or modification of the proposed comprehensive revisions or amendments to the Zoning Maps.

Secondly, the opponents argue that Section 267-13(E)(3) of the Code, prohibits the acceptance of applications for a period of one year after the adoption of the comprehensive rezoning bill, in this case, Bill 97-55, if the basis for the request for rezoning is a "change in the character of the neighborhood". Specifically, section 267-13(E)(3) provides:

> (3) No zoning reclassification of property shall, for a period of one (1) year after the adoption, by Bill, of the comprehensive zoning maps applicable thereof, be granted by the County Council, sitting as the Board of Appeals, on the ground that the character of the neighborhood has changed.

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

The first question posed is whether the "period of review" contemplated by Section 267-13(E) has ended by Council vote on Bill 97-55 or whether the period of review is extended until the referendum vote takes place in November, 1998. If the period of review is extended, then the moratorium on acceptance of piecemeal rezoning applications would likewise be extended until that vote takes place. The opponents argue that allowing rezoning cases to be heard on a piecemeal basis would defeat the purpose of the referendum and, quoting the opponent's brief, "..If zoning reclassification applications are accepted prior to November 3, the vote on the referendum will effectively be rendered moot and the right of the voters to review by petitioning Bill 97-55 to referendum will be infringed."

The Hearing Examiner disagrees with the position taken by the opponents. The Hearing Examiner is guided by the principals of statutory construction set forth by the Maryland Court of Special Appeals in Harford County, Md. V. McDonough, 74 Md. App. 119, 523 A2d 724 (1988), wherein the Court stated:

> " The cardinal rule of statutory interpretation is to ascertain and give effect to the intention of the legislative body which enacted the statute. The primary source to which we refer to determine legislative intention is the language of the statute itself. As this Court observed in Ford Motor Land Development v. Comptroller, 68 Md. App. 342, 346-47, 511 A.2d 578, cert.denied, 307 Md. 596, 516 A.2d 567 (1986):
>
> > "Where the language [of the statute] is clear and free from doubt the Court has no power to evade it by forced and unreasonable construction". Thus, where there is no ambiguity or obscurity in the language of the statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly. Furthermore, the statute must be construed considering the context in which the words are used and viewing all pertinent parts, provisions ans sections so as to assure a construction consistent with the entire statute. And, if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory. On the other hand, we shun construction of the statute which will lead to absurd consequences, or a proposed statutory interpretation if its consequences are inconsistent with common sense.

> Finally, we may not rewrite the statute by inserting or omitting words therein to make legislation express an intention not evidenced in its original form, or to create an ambiguity in the statute where none exists."

In the context of the comprehensive rezoning process, the "period of review" ended when the Council voted to pass Bill 97-55. No further review is necessary on the part of the Council, the Department of Planning and Zoning, the citizens advisory boards or any other county department that has thoroughly reviewed the various applications and made their recommendations. Whether ultimate adoption of Bill 97-55 is accomplished by referendum vote or whether the Bill is defeated is irrelevant in determining the "period of review" contemplated by the statute. This position is consistent with the moratorium provisions imposed by 267-13 which are designed to alleviate the burdens on the Department of Planning and Zoning and the County Council in reviewing piecemeal rezoning requests during the period of comprehensive review. It is equally clear, however, that there is one process or the other available to County property owners at all times. Either a property is the subject of comprehensive rezoning or is subject to piecemeal rezoning requests and nothing in the Code indicates a legislative intent to deny the right of any property owner to petition his or her property for rezoning for indefinite and undetermined periods of time.

Bill 95-85 was passed by the Council in January, 1996 and provided that , for a period of eighteen months from the date comprehensive rezoning commenced, no applications for rezoning would be accepted. Legislation to revise the Master Land Use Plan was introduced on May 7, 1996 and eighteen months from that date expired in November, 1997. If there were any further doubt as to the intent of the legislative body in this regard, it is laid to rest by examining subsequent acts of the Council directly related to the petition for referendum. On December 16, 1997, Councilwoman Heselton introduced Bill 97-79 which purported to be an Emergency Act which would extend the moratorium on acceptance of rezoning applications originally instituted for an eighteen month period by Bill 95-85 until after the referendum vote in November. The Bill recites as reasons for its necessity nearly all of the arguments raised by the opponents in this Motion. Significantly, this Bill was defeated by vote of the County Council

5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.d. 166 (1970), The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.d. 640 (1963).

As stated by the Maryland Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

> "...is overcome and error or mistake is established when there is probative evidence to show that the assumptions of premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to rezoning have proven that the Council's initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive rezoning is not overcome, and the question of error is not "fairly debatable". Joyce v. Smelly, supra; Rockville v. Stone, 27 Md. 655, 319 A.d. 536 (1974) (emphasis added).

Thus the Maryland Courts have laid out a two-pronged test. First, has a change in the character of the neighborhood or a mistake been established that would permit the rezoning of the property. Second is whether the property should be rezoned.

Case No. 073 - 1022 S. Fountain Green Road LLC/Maryland Country Club

During the 1989 Comprehensive Rezoning, the County Council could not have taken into account pertinent facts regarding expansion of the water and sewer service to the subject property which occurred subsequent to Comprehensive Rezoning in the early 1990's. The Applicant established convincingly that the study to review the system and recommend revisions and expansion did not even commence until after the 1989 Comprehensive Rezoning process was completed. Further, the Applicant established that a trend requiring additional low density housing has occurred since 1989 which need was met by the Council by reclassifying the property as low intensity and attempting to rezone it R1 in 1997. None of these trends or facts were known to the Council in 1989, thus it mistakenly zoned the property AG in 1989.

The Applicant has established that the subject parcel is surrounded by residential development making it difficult to actively farm. The property has acquired easements which will allow water and sewer service to reach the proposed development. The proposal is consistent with the Master Land Use Plan and good planning principles. Public water and sewer is intended to serve residential development, not agricultural uses. The Applicant presented unrebutted evidence that there will be no adverse impact on traffic patterns or volumes, nor would the development negatively affect property values in the immediate neighborhood. Importantly, the LLC property was the subject of intense review by the Department of Planning and Zoning, various county departments, the citizen advisory councils and the Harford County Council which, after this intense review, voted to rezone the property to an R1 designation.

In the opinion of the Hearing Examiner, therefore, the Applicant has met its burden of proof by establishing that a legal mistake was made by the Council during the 1989 Comprehensive Zoning Review and further, that the property is appropriately zoned as R1. The Hearing Examiner recommends that the requested rezoning be approved.

Date March 31, 1998

William F. Casey
Zoning Hearing Examiner